Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

No. 96-1231

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

E. I. DU PONT DE NEMOURS AND COMPANY,
Petitioner,

v.

BARBARA R. SHERIDAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

RAYMOND MICHAEL RIPPLE *
DONNA L. GOODMAN
Legal/D-7012
E. I. DU PONT DE NEMOURS
AND COMPANY
1007 Market Street
Wilmington, DE 19898
(302) 773-3072
Counsel for Petitioner
* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

6 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1231

E. I. DU PONT DE NEMOURS AND COMPANY,
Petitioner,

v.

BARBARA R. SHERIDAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY MEMORANDUM

I.

In her Opposition, Respondent Sheridan rightly concedes that if this Court finds a conflict among the circuits, "the present case is well presented and an appropriate vehicle to resolve such conflict." (Opp. 9). Indeed, the law of the circuits is in disarray, and litigants are subject to diverse standards as to production of proof in this type of case.

As we amply demonstrated in the Petition (Pet. 6-13), the circuits are deeply divided in their views on the burdens of production of evidence. Respondent's view of the state of the law, especially that DuPont relies upon dicta in the opinions of the First and Fifth Circuits (Opp. 2, 8), is simply in error. The disharmony of the circuits has only been compounded by decisions since the filing of the Petition.

The recent Eighth Circuit *en banc* decision in *Ryther v. KARE 11*, No. 94-3622, 1997 WL 94025 (8th Cir.

(*en banc*) Mar. 6, 1997),[1] reinforces the depth of the division among the circuits. In *Ryther*, the *en banc* court, while stating that it found certain support from *Sheridan v. E. I. du Pont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), was careful to note that unlike *Sheridan*, and consistent with its earlier opinion in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), the Eighth Circuit subscribes to the principle that evidence of pretext alone does not always support an inference of intentional discrimination. *Ryther* at *4 n.2.

More specifically, the Eighth Circuit agreed with the Third Circuit's interpretation of *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993), that the elements of a prima facie case together with disbelief of the defendant are the threshold findings beyond which the jury is permitted, but not required to draw an inference of discrimination. *Ryther* at *4. However, the Eighth Circuit carefully "emphasize[d] that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." *Ryther* at *4. *Sheridan*, on the other hand, stands for the proposition that disbelief, together with the elements of the prima facie case, will always be enough to support a jury verdict. [App. 15a-17a, 26a, 42a-43a]; *see also Ryther* at *4 n.2.

The *Ryther* court highlighted the Eighth Circuit's continued adherence to the principle that pretext alone will not always be sufficient with a discussion of *Rothmeier* and *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986). In those two cases, explained the court,

---

[1] Petition for cert. filed April 4, 1997. While *Ryther* deals with issues similar to *Sheridan*, but arising under the Age Discrimination in Employment Act, we submit that the instant case presents a better vehicle than *Ryther* for a clarification of the doctrine set forth in *Hicks*. *Ryther* is a judgment fractured by partial concurrences and dissents. That case also contains a number of facts upon which a jury, following the correct standard, could have found in the favor of plaintiff.

judgment was rendered in favor of the employer because the employees' proof of pretext was simply insufficient to support a reasonable inference of discrimination. *Ryther* at *4 n.4.

Ryther confirms that the division among the circuits remains deep on whether a plaintiff may be required to show more than the minimal prima facie case and disbelief of the defendant's reason in order to permit a jury to draw an inference of the ultimate fact of discrimination.[2]

II.

Since the filing of the petition for writ of certiorari in this case, the Eleventh Circuit handed down another panel decision interpreting *Hicks*, *Combs v. Meadowcraft, Inc.*, No. 95-6922, 1997 U.S. App. LEXIS 3028 (11th Cir. Feb. 20, 1997). At the time of the submission of the petition, the latest Eleventh Circuit opinion interpreting *Hicks* was *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996). In *Isenbergh*, a panel of the Eleventh Circuit determined that *Hicks* supported the conclusion that only "sometimes" will the plaintiff's prima facie case and disbelief of the defendant's reason allow plaintiff to defeat judgment. *Isenbergh*, 97 F.3d at 442.

However, the panel in *Combs* relied upon the earlier decision in *Hairston v. Gainesville Sun Publishing Co.*,

---

[2] Eighth Circuit panel decisions since *Ryther* confirm that that court has taken a different path from the Third Circuit. *Feltmann v. Sieban*, 1997 U.S. App. LEXIS, 5138, *15 (8th Cir. March 20, 1997) (even if employer's proffered reason is disbelieved, the jury's verdict must still be supported by evidence of discrimination); *Brandt v. Shop 'n Save Warehouse Foods, Inc.*, 1997 U.S. App. LEXIS 4973, *11-12 (8th Cir. March 17, 1997) (even if employer is found to be "dissembling" about its reasons for an employment action, employee must still prove "that the pretext was intended to conceal unlawful discrimination" or that the protected characteristic "in any way motivated the employment action"); *Thomas v. Runyon*, 1997 U.S. App. LEXIS 5673, *12 (8th Cir. March 18, 1997) (plaintiff failed in his pretext burden "because he has put forward inadequate evidence to prove that his transfer was racially motivated").

9 F.3d 913 (11th Cir. 1993), for the proposition that a plaintiff is entitled to survive summary judgment and judgment as a matter of law based on a prima facie case and disbelief of the employer, "that alone is enough to preclude entry of judgment as a matter of law." *Combs* at *21, *32, *37. The *Combs* panel was concerned that the position of the Eleventh Circuit should be altered on less than a consideration of the problem by the full court; the *Combs* court directed that earlier Eleventh Circuit opinions, and not opinions such as *Isenbergh*, "will be the law of this circuit unless and until the *en banc* Court, the Supreme Court, or Congress changes it." *Ibid.* at *37. Thus, the *Combs* case illustrates that not only does a deep division exist among the circuits, but also within some circuits as well.

III.

Sheridan has both mischaracterized DuPont's positions and misstated a number of important facts. For example:

A. Sheridan was charged with not properly accounting for complimentary food and drinks in the hotel [App. 7a, 31a], not with having "stolen drinks" (Opp. 4). Also, in that regard, if Sheridan refers to Mr. Dougherty as the "male author" of the list of improperly recorded complimentary drinks, the record does not support Sheridan's allegation that he was rewarded by replacing Sheridan in her head captain's job. (Opp. 4-5). In fact, Dougherty did not replace Sheridan. Dougherty testified at trial in 1994, two years after Sheridan left the hotel, that he was then a head captain, but had progressed to that job through several other positions subsequent to his position as bartender, and a training program.

B. In making her statements regarding the gender composition of the head captains (Opp. 5), Respondent overlooks the finding of the district court that women were fully represented in the hotel's head captain and other equivalent positions. [App. 127a].

C. Sheridan mischaracterizies this case as one of "mendacity". (Opp. 2, 4). DuPont's reasons for its actions may not have been accepted by the jury, but neither

the district court nor the court of appeals considered this a "mendacity" case. "To say that a company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd." *Hicks*, 113 S.Ct. at 2754. In fact, Sheridan could only refute 7 out of the 46 dates listed by Dougherty [App. 33a], contrary to Sheridan's implication that all dates were disproved (Opp. 4-5), and Dougherty testified that his dates were only about 98 percent accurate. [App. 32a].

D. Contrary to Respondent's mischaracterizations, DuPont did not argue that *Hicks* "was a dramatic and hurtful change in the law for employers" and that a plaintiff always needs additional evidence of discrimination beyond her prima facie case and disbelief of the employer's reason. (Opp. 2, 7). In fact, DuPont has argued consistently that a proper reading of *Hicks* supports its position. (Pet. 13-19). Furthermore, it is DuPont's position that a plaintiff must show *both* that the reason was false, *and* that discrimination was the real reason (Pet. 15), and in *this* case, the disbelief of DuPont's reasons coupled with the bare and minimal facts of Sheridan's prima facie case was not enough to allow an inference of intentional discrimination. (Pet. 13, 16).

DuPont submits that a clear, deep, and persistent divide exists among the circuits on the application of the principles in *Hicks*. The issue is ripe for decision, and the case at bar provides a good vehicle for the clarification of all aspects of *Hicks*. The petition should be granted.

Respectfully submitted,

RAYMOND MICHAEL RIPPLE *
DONNA L. GOODMAN
Legal/D-7012
E. I. DU PONT DE NEMOURS
AND COMPANY
1007 Market Street
Wilmington, DE 19898
(302) 773-3072
Counsel for Petitioner

* *Counsel of Record*